

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
Case No.: 9:16-cv-81710-KAM**

DARRYL ASHMORE,

Plaintiff,

v.

NFL PLAYER DISABILITY AND
NEUROCOGNITIVE BENEFIT PLAN,

Defendant.

**PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION TO STRIKE**

Plaintiff, Darryl Ashmore, hereby responds to Defendant's Motion to Strike [DE 47] and states:

I. INTRODUCTION

Mr. Ashmore submitted extensive proof of his total and permanent ("T&P") disability throughout the application and appeals process. Still, Defendant denied Mr. Ashmore's T&P benefits without reviewing any medical evidence. Incredibly, Defendant now seeks to benefit from its outright failure to comply with the requirements of ERISA and deliberate exclusion of documentation. For the reasons set forth below, the Court should deny Defendant's Motion to Strike.

II. ARGUMENT

On April 29, 2016, Mr. Ashmore submitted an appeal to the denial of his application for T&P disability benefits. [Ashmore 372-380]. Along with his appeal, Mr. Ashmore submitted copious amounts of medical records confirming his T&P disability. [Ashmore 417-492]. Mr.

Ashmore supplemented his appeal with additional medical records via letters dated (i) July 13, 2016; (ii) July 21, 2016; (iii) July 28, 2016; and (iv) August 24, 2016. [Ashmore 596-616, Ashmore 618-789, DE 40-6, DE 40-7]. Defendant now argues that the medical records received on July 28, 2016 and August 24, 2016, should be stricken because they are not contained in the Administrative Record and were never before the Disability Board (“Board”). [DE 47]. Defendant, alone, is responsible for this outcome. Indeed, no fault can be attributed to Mr. Ashmore.

Mr. Ashmore submitted the records at issue to Plan staff prior to receiving an appeal denial.¹ These records are more in the same with what was previously submitted in that they establish his total and permanent disability. Still, he fully expected these records, along with the hundreds of medical records submitted before, would be presented to the Board for consideration.² His expectations weren’t met. In violation of ERISA, Plan staff chose not to present these records to the Board.

ERISA mandates that denied claims receive a “full and fair review.” 29 U.S.C. § 1133(2), ERISA § 503(2).³ The regulations specify the attributes necessary to achieve a “full and fair review,” including that Plan administrators must “**provide for a review that takes into account all comments, documents, records, and other information submitted by the claimant relating to the claim, without regard to whether such information was submitted or considered in the initial benefit determination.**” C.F.R. § 2560.503-1(h)(2)(iv). (emphasis added). In fact, the NFL

¹ Mr. Ashmore received a letter denying his appeal on August 24, 2016, subsequent to his submission of his August 24, 2016 letter.

² Defendant acknowledges that Plan staff is responsible for assembling and preparing application-related materials to the Disability Board in advance of each quarterly meeting.[DE 47 p. 3].

³ The Department of Labor regulations (“regulations”) require that “[e]very employee benefit plan shall establish and maintain a procedure by which a claimant have a reasonable opportunity to appeal an adverse benefit determination... and which there will be a full and fair review of the claim and the adverse benefit determination.” C.F.R. § 2560.503-1(h)(1).

Player Disability and Neurocognitive Benefit Plan (the “Plan”) itself stipulates that the “**Disability Board’s review of the adverse determination will take into account all available information, regardless of whether that information was presented or available to the Disability Initial Claims Committee.**” (emphasis added). [Ashmore 54]. In light of ERISA’s requirement of a full and fair review, and the Plan itself, the Plan staff should have presented *all* of Mr. Ashmore’s medical records to the Board.

Defendant attempts to justify its actions, or lack thereof, by claiming Mr. Ashmore missed the deadline to submit records for review. Defendant points to a May 4, 2016 letter, in which it unilaterally set a deadline of July 19, 2016 for Mr. Ashmore to submit records. [Ashmore 594]. To be sure, the regulations do not allow for the imposition of such a deadline. In fact, when asked specifically to state the legal basis for the imposition of such a deadline, Defendant stated “[t]he Plan gives the Disability Board . . . the power to . . . adopt rules and procedures for the administration of the Plan.” [DE 40-2 ¶ 17]. Yet, Defendant failed to actually identify what procedure or rule it adopted. Why? Because the Board had not adopted any rules or procedures regarding the implementation of a deadline.

Interestingly, the Board was presented with Mr. Ashmore’s entire file on August 17, 2016 – as indicated with a “DBM – 8/17/2016,” label. [AR 369-804]. Given that the July 28, 2016 letter and records were submitted to the Plan staff prior to the presentment of Mr. Ashmore’s entire file to the Board, these records, at a minimum, should have been made a part of the Administrative Record. *See Vega v. National Life Ins. Services, Inc.*, 188 F.3d 287, 300 (5th Cir. 1999)(en banc)(“[t]he administrative record consists of relevant information made available to the administrator . . . that gives the administrator a fair opportunity to consider it).

These records represent a small portion of the hundreds of medical records submitted with Mr. Ashmore's application for T&P disability benefits *all* confirming his T&P disability. None of the medical documents presented to the Court in Plaintiff's Motion for Summary Judgment, including the records at issue, are new. All such information was presented to Defendant prior to the initiation of this lawsuit. It was Defendant who chose not to review all of the documentation.

III. CONCLUSION

Mr. Ashmore respectfully requests the Court deny Defendant's Motion to Strike [DE 47].

Respectfully submitted this 15th day of December, 2017,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing Motion with the Clerk of Court by using the CM/ECF system, which will, in turn, send a notice of electronic filing to Defendant's attorneys:

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